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KENNETH J. MURPHY
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IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

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U.S. DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WEST DIV CINCINNATI

Ted Marcum, :
Petitioner, : Case No. C-1-02-425
vs. : Honorable Judge Herman Weber
William A. Tanner, Warden, : Magistrate Judge Jack Sherman
Respondent. :
:

NOTIFICATION TO THE UNITED STATES DISTRICT COURT AND REQUEST TO ADVISE
THE UNITED STATES ATTORNEY GENERAL OF HIS RIGHT TO APPLY FOR
"INTERVENTION" PURSUANT TO 28 U.S.C. § 2403(a)

Comes now the Petitioner, Ted Marcum, acting in pro se, who hereby respectfully urges and submits to the United States District Court, a request, asking the Court to serve notice upon the U.S. Attorney General, and advising the Attorney General of his right to apply for "Intervention," pursuant to 28 U.S.C. § 2403.

Petitioner states that he has challenged the Constitutionality of the Anti-terrorism and Effective Death Penalty Act of (1996) (Also Known As The [AEDPA]). Petitioner additionally challenged the "Application" and/or the "Enforcement" of the Act, as unconstitutionally applied towards "persons" who are not a "Death Penalty" Case; Who are not "Terrorists;" Or persons who are not Immigrants. (See, Traverse Brief, Part No. I, Filed in May of 2003).

In addition to filing a "Traverse" attacking the (AEDPA), the Petitioner has filed a request with this Federal District Court for assistance to secure "evidence" by Former President, William Clinton, pertaining to the viability and constitutionality of the (AEDPA); And a request to Mr. Clinton to define his "interpretation" on the scope of the Act.

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It is accordingly respectfully requested to the District Court, for notice, advising the United States Attorney General of his right to Respond to the Petitioner's challenges raised by the Petitioner in his traverse Pleadings, (And any other Pleadings contesting the [AEDPA]).

Section 2403, 28 U.S.C., provides in pertinent/relevant parts a duty to address or defend the Constitutionality of an Act of Congress when the Act (or Statute) is challenged. Specifically, Section 2403 says in whole that:

"... In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The United States shall, subject to the applicable provisions of law, have all the rights of a party and subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality."

(Emphasis Added).

In the present case, Petitioner argued in his **Traverse, Part No. I**, numerous claims attacking both the Constitutionality of the (AEDPA); As well as to its "application" and "Enforcement" on behalf of Non-Death Penalty Cases and Non-Terrorists. Although there is case authority which have held that it is not a "jurisdictional defect" on the part of the District Court for failing to certify the question of the Constitutionality of the Act being challenged, See, generally, Wallach vs. Lieberman, 366 F.2nd 254 (C.A. 2, 1966) (Holding that the District Court's failure to certify the question of the Constitutional attack on the Act of the federal statute to the Attorney General, did not divest the Court of "jurisdiction" to "rule" on the constitutionality of the federal statute) ... Petitioner believes that it is better practice

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by the Federal Courts to "advise" the U.S. Attorney General that an Act of Congress (or Federal Statute) has been challenged on Constitutional Grounds. In fact, pursuant to Fed. Civ. Rule 24(c), suggest that a "party" to an action challenging an Act of Congress should file a inquiry with the District Court reminding the Court of "[i]ts consequential duty" to notify the Attorney General of its intervention rights. See, Also, Tonya K. by Diane K. vs. Board of Educ. of City of Chicago, 847 F.2d 1243, 1247 (C.A. 7, 1988).

In the present case, Petitioner/Marcum filed a Habeas Corpus Petition challenging his State Court Conviction by the Butler County, Ohio Court of Common Pleas for: [1] Assault on a Hamilton, Ohio City Police Officer; [2] Defrauding a Livery; [3] Disorderly Conduct; And [4] resisting Arrest. Petitioner was found "guilty" by a Jury Trial in February of 1996. (See: Butler County Comm. Pl. Case No. CR95-09-0883).

On June 11th, 2002, Petitioner/Marcum filed a Federal Habeas Corpus Petition with Honorable District Court Judge Herman Weber and Honorable Magistrate Judge Jack Sherman, Judges of the United States District Court, Southern District of Ohio, Western Division, Cincinnati, Ohio. (See: Case No. C-1-02-425). Petitioner did not cite the Anti-terrorism and Effective Death Penalty Act(s) Amendments in his Habeas Corpus Petition. The Magistrate issued an Order to Show Cause directed to the State Attorney General of Ohio, and Ordering the Respondent to file a "Return of Writ" Responding to the Grounds asserted in the Habeas Corpus Petition. In August of 2002, the Assistant Ohio Attorney general

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filed a "Return of Writ" on behalf of the Respondent, Warden William Tanner. Thereafter, following a number of motion(s) for extension of time, discovery of evidence, and motion(s) to compel the Respondent to "Expand and Supplement the Record" (which were GRANTED, in part, by the District Court in February of 2003). The Respondent filed a supplemental "Answer" in response to the Order compelling the Respondent to produce Medical Records (which the Respondent has failed to comply). In May of 2003, Petitioner filed a **Two Part Traverse** Responding to the "Return of Writ" and further raising constitutional challenges to the validity of the Anti-Terrorism and Effective Death Penalty Act (1996). **F.N.1**

Petitioner now brings to the "attention" of this Federal Court, its "consequential duty" to "notify" the United States Attorney General of their right for intervention pursuant to 28 U.S.C. § 2403 and **Fed. Civ. R. 24.**

It must be first pointed-out that a period of 4-months has passed between the date that Marcum collaterally challenged these newly Habeas Corpus Statutes (**through his Traverse Brief, Part No. I**), up to todays date. It must be further pointed-out that the Ohio Attorney General was served with a copy of Petitioner's **Traverse Pleadings**, and that the State of Ohio has remained silent by not contesting the Petitioner's challenge(s) to the (AEDPA). Petitioner states that, for the sake of thoroughness, and to allow the United States Attorney General an opportunity to **present evidence or arguments** defending the (AEDPA), that the Court in the case at bar, should contact the United States Attorney General

F.N.1 Petitioner additionally has filed a Motion requesting an "evidentiary hearing" and a request for appointment of "co-counsel" to assist this Petitioner. Additionally, in light of the fact that Petitioner has submitted evidence by a published statement signed by Former President William Clinton to support Petitioner's contentions that the (AEDPA) is unconstitutional, is further reason warranting notification to the U.S. Attorney General.

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advising him that the newly enacted provisions of the [Habeas Corpus Statutes], set forth in the (AEDPA), are currently challenged on Constitutional Grounds; and further are challenged as applicable **only** towards: [1] Death Penalty Cases; [2] Terrorist(s); And [3] Matters pertaining to Immigration.

Petitioner further respectfully requests that a photo-copy of **all** pleadings filed in this Federal Habeas Corpus Proceeding be **served** upon the U.S. Attorney General, at **his** expense, See, 28 U.S.C. § 2403, (holding in relevant part, that: "... [t]he United States ... have all the rights of a party and subject to all liabilities of a party as to **court costs** as to the extent necessary for a proper presentation of the facts and law relating to the question of Constitutionality.")

Petitioner further respectfully moves this Honorable Court for an ORDER ... directing the United States Attorney General to file an "answer," no later than Twenty (20) Days from the date that he receives the Notification by the Court. The "answer" must inform the Court, and all parties herein, of the U.S. Attorney's decision whether He does intend to file an application for intervention; or whether He does not intend to file an application for intervention.

If in the event the Attorney General does choose to exercise his intervention rights, Petitioner moves the Court to ORDER the U.S. Attorney General to file his Brief or Memoranda by no later than Sixty (60) additional days from the date receiving the Court's Order.

If in the event the Attorney General fails to comply with the "timeliness" requirements, as set by the Court, Petitioner moves the Court to find that the Attorney General has "forfeited" his right to apply for intervention. **F.N.2**

When applying a **timeliness** rule under Civ. R. 24(a), Petitioner requests this Court to apply it as an **abuse of discretion**. Vollmer v. Publishing Clearing House

F.N. 2 Fed. Civ. R. 24(a) requires a "timeliness" test when applying for Intervention. See, Association Building & Contractors, Inc. vs. Herman, 166 F.3d 1248, 1257 (D.C. 1999). Any substantial lapse in time weighs heavily against intervention. See, U.S. vs. Washington, 86 F.3d 1499, 1503 (9th Cir. 1996). The timeliness Rule means that that the intervenor/applicant must "act with dispatch." See, Atlantic Mutual-Insurance Co. vs. Northwest Airlines, Inc., 24 F.3d 958, 961 (7th Cir. 1994).

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Subscriptions, Inc., 248 F.3d 698, 705 (7th Cir. 2001) (Holding that timeliness on the part of the United States delay in failing to file for intervention is reviewed based on an "abuse of discretion.")

Accordingly, Petitioner respectfully moves this Honorable Court to send notification to the United States Attorney General, with an ORDER directing the U.S. Attorney General that he has only Twenty (20) days to file an answer to the notice indicating whether he (the U.S. Attorney General) does or does not intend to "intervene;" And, if the U.S. Attorney General does indicate a desire to intervene, within that Twenty (20) day time period, it is requested by the Petitioner, that an additional Sixty (60) day period be provided to the U.S. Attorney General on the filing of any Memoranda or Brief.

As an outset, Petitioner points-out that, although he (Petitioner/Marcum) has not filed a **Declaratory Judgment Action** challenging the (AEDPA), does not mean that the Petitioner has properly challenged the (AEDPA) through his **Traverse** in his **Habeas Corpus Action**.

Simply stated, it is the believe that the Petitioner can attack the constitutionality, as well as the applicability, or scope of the (AEDPA), through an action in Federal Habeas Corpus Proceedings.

In support, Petitioner relies upon the decision decided by the United States Supreme Court. See: Calderon v. Ashmus, 523 U.S. 740, 118 S.Ct. 1694, 140 L.Ed.2d 970 (1998) (Holding that Habeas Corpus, Not Declaratory Judgment, is the appropriate remedy to use to determine the effective "statute of limitations" in Habeas Corpus Cases). Thus, Petitioner correctly used his **Traverse Brief** as a response to the State of Ohio's Return of Writ to challenge the (AEDPA), through this **habeas corpus action**. Further, Petitioner points-out that, although the Petitioner never initially "challenged" the (AEDPA) through his **Habeas Corpus Petition**, does not

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mean that the Petitioner is precluded from collaterally challenging the (AEDPA) through his **Traverse Pleading(s)**. The Respondent in this case raised the (AEDPA) as a "heighten" standard in Federal Habeas Corpus Proceedings. In Response, the Petitioner rebutted the Return of Writ, and challenged the (AEDPA). Thus, it is the opinion of this Petitioner that he did properly challenge the (AEDPA), on Constitutional Grounds, through his **Traverse Pleading(s)**. **F.N.3**

In the present case, as noted above, Petitioner has requested a "subpoena" to secure "evidence" by Former President, William Jefferson Clinton. Petitioner says that on April 24, 1996, President Clinton signed a "Statement" on the Anti-terrorism and Effective Death Penalty Acts indicating that: [1] He signed the Bill to "combat terrorism;" [2] He signed the Bill to limit the "unlimited streamline" of Federal Appeals challenging "Death Penalty" Cases; and [3] Mr. Clinton stated in his "Statement" that the (AEDPA) would raise serious constitutional challenges to the (AEDPA) if it were read to "undermine" meaningful Federal Habeas Corpus Review by Federal Judges within their "respected jurisdictions." (See: Exhibited [A] Attached to Part I, Traverse). **F.N.4**

In addition to Constitutional Challenges, Petitioner raised in this Habeas Corpus Proceeding: [1] "Actual Innocence;" [2] "Fundamental Miscarriage of justice;" [3] "Equity;" and [4] "Common Law" Powers retained by the Federal Courts to issue all writs of habeas corpus. **F.N. 5**

F.N. 3 The Supreme Court held that pro se Habeas Corpus Petitions and social security applications must be construed in a "less stringent standard" than attorneys of the Bar. See: Hughes v. Rowe, 449 U.S. 5, 101 S.Ct. 173 (1980); Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594 (1972). Thus, Petitioner moves this Court to entertain his "Traverse" as a proper Responsive Pleading to Challenge an Act of Congress as unconstitutional.

F.N. 4 Judicial Notice was taken that Mr. Clinton signed the (AEDPA) "some-time in the afternoon" on April 24, 1996, on the South Lawn of the Rose Garden outside the White House. See: Mincey v. Head, 206 F.3d 1106, 1131, N.58 (11th Cir. 2000).

F.N. 5 Petitioner raised the Suspension Clause; Separation of Powers Doctrine; The Doctrine of "Eiusdem generis;" The Judiciary Act; The War Powers Act; And Violations under Art. I,II,III,VI, U.S. Const., And the 1st,5th,9th,10th and 14th Amendments. (See, Part No. I, Traverse).

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In addition to the above, Petitioner has found cases where the Federal Courts have authorized § 2241(c) to challenged State Court Convictions, notwithstanding the fact that § 2254 is the main Statute on behalf of State Prisoners. See e.g., Montez v. McKinna, 208 F.3d 862, 864-869. Moreover, Circuit Court Judge McKay, Tenth Circuit, pointed-out that § 2241 has been effectively used to address certain State Prisoners Petitions either prior to the "execution" of a sentence; or to challenge "parole" violation matters. *Id.* 869-871.

In Marcum's case, he filed a Petition under § 2254 attacking his **conviction**, as well as a Habeas Corpus Ad Testificandum Petition requesting to brought to a "hearing" under § 2241. Moreover, in light of the fact that Marcum's "parole" was "revoked" on the underlying criminal convictions pertaining to the Assault Charge; Defruading a Livery; Resisting Arrest; and Disorderly Conduct, is further reason authorizing Petitioner/Marcum to attack his State Court Convictions under both: §2241 and §2254. See Montez at: 865 (Holding: "[n]oting and implicitly approving fact that state prisoner was proceeding pursuant to both §§ 2241 and 2254;") (Citing Cooper v. Schear, Nos. 98-1158, 1159, 1999 WL 140447, at *1 (10th Cir. Jan. 15, 1999), unpublished disposition.) F.N. 6

Moreover, the United States Supreme Court authorized a state prisoner to properly rely upon § 2241 while he was on "parole" as the proper statutory relief under the "in custody" doctrine. See, Jones v. Cunningham, 371 U.S. 236, 236, 241, 83 S.Ct. 373, 9 L.Ed.2d 285 (1963); Cf. See, also, Liang v. I.N.S., 206 F.3d 308, 317 (2000) (applying Felker v. Turpin, 518 U.S. 651, 116 S.Ct. 2333, 135 L.ED.2d 827 (1996)) (Noting that the [AEDPA] did not "repeal" the jurisdiction of the U.S. Supreme Court to grant writs of habeas corpus as an "original action" under §2241).

F.N. 6 However, there is split authority to the contrary, See, Coady v. Vaughn, 251 F.3d 480, 484-486 (3rd Cir. 2001) (Holding that in light of Congressional enactment under § 2254, as opposed to § 2241, is the appropriate statutory remedy that State Prisoners must apply under in Federal Habeas Corpus Proceedings) But, Cf., See: Hunt v. Tucker, 875 F.Supp. 1487, 1493, N.2 (N.D. Ala. 1995) (Holding that §§ 2241 through 2255 were enacted in Response to the British Habeas Corpus Act of 1679, and further holding that the Suspension Clause, Art. I, § 9, ¶ 2, is made applicable upon the States through the 14th Amendment) *Id at:* 1493-94.

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In any event, Petitioner states that this Federal Habeas Corpus Proceeding is brought pursuant to §§ 2241 and 2254, U.S.C. Petitioner further invoked the "jurisdiction" of this Honorable Federal Court pursuant to Art. I, § 9, ¶ 2, ("Suspension Clause"); Art. III, § 1 and § 2, ("Judiciary" Article of the U.S. Constitution); Art. VI ("Supremacy Clause"); And pursuant to the Due Process Clause(s) of the 5th and 14th Amendment(s), as made applicable through to the individual States.

Turning now to other related matters. Pursuant to Fed. Civ. R. 24(a)(2) provides that the U.S. Attorney General shall be allowed to "intervene" unless: "... [t]he applicant's interest are adequately represented by existing parties." *Id.* Under this standard, the Sixth Circuit has articulated the right to intervene by explaining an established Three Elements Tests: [1] An interest in the subject matter of the pending litigation; [2] A substantial risk that the litigation will impair the interest; And [3] Existing parties do not adequately protect that interest. See, Americans United for Separation of Church and State vs. City of Grand Rapids, 922 F.2d 303, 305 (6th Cir. 1990); See, Also, Jordan vs. Michigan Conference of Teamsters Welfare Fund, 207 F.3d 854, 863 (6th Cir. 2000) (Setting-forth a Five (5) part element Test).

In the present case, it must be taken under advisement that the Ohio State Attorney General, Jim Petro, has not filed a response in opposition to Marcum's Traverse, Part I, which challenges the (AEDPA). Although Marcum himself raised legal claims on both-points-of-view pertaining to the scope of the (AEDPA) ... it is requested that the U.S. Attorney General be afforded an opportunity to raise any claim he or she has to offer on the subject.

Petitioner further would appreciate the assistance of any other "interested party" to file "intervention" (such as: The American Bar Association or the Civil Liberties Union). Petitioner asketh the United States District Court allow these other legal associations to be brought in under "intervention" or as a "friend"

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of the Court by asking the American Bar Association and The Civil Liberties Union to file a amicus curiae brief in support of the Petitioner's stance of the (AEDPA). F.N. 7

WHEREFORE, Petitioner moves the Court to advise all "interested" persons to apply for "intervention" or as amicus curiae.

Very Respectfully Submitted,

Ted Marcum

Ted Marcum, Petitioner, pro se

F.N. 7 Petitioner found one case by the Second Circuit Court of Appeals, See, Rowe v. Peyton, 383 F.2d 709 (4th Cir. Va., 1967), which held: "[T]he writ of habeas corpus is not a creature of a legislature. It was a device fashioned by the common law courts to protect and extend their own jurisdiction" Id at: 715 Aff'd. 88 S.Ct. 1549, 391 U.S. 54, 20 L.Ed.2d 426 (1967)).

CERTIFICATE OF SERVICE

This is hereby to certify to that a true copy of the above foregoing Notification was sent to all of the below agencies or persons by regular U.S. Mail, postage preaffixed thereto, on the 15th day of September, 2003.

cc:

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